RIANTO BIN SUMIRAN

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR
PUAN ZALEHA ZAHARI JC
[CRIMINAL APPEAL NO. 42-59-92]
19 AUGUST 1994

CRIMINAL PROCEDURE: Armed robbery - Firearms (Increased Penalties) Act 1971 s. 4 - End of prosecution case - Application of maximum evaluation test - Whether test meant prosecution had to prove case beyond reasonable doubt.

CRIMINAL PROCEDURE: Charges - Armed robbery - Robbery committed on two persons at same time and place - Whether two distinct offences - Whether two separate charges to be preferred - Criminal Procedure Code ss. 153(i), 163 - Penal Code s. 71 Illustration 2.

CONSTITUTIONAL LAW: Articles 5(3) & 8 of the Federal Constitution -Right to Counsel - Equality before the law - Accused tried under s. 4 of the Firearms (Increased Penalties) Act 1971 without assistance of Counsel - Whether hearing thereof unconstitutional.

EVIDENCE: Adverse inference - Adverse inference drawn against accused - Facts equally consistent with inference in accused's favour - Inference in accused's favour not considered - Whether fatal.

EVIDENCE: Identification evidence - Armed robbery - Whether accused the man holding the firearm - Correctness of identification - Whether to be evaluated - Identification evidence of poor quality - Whether there was special need for Court to caution itself before accepting evidence.

EVIDENCE: Information leading to discovery - Section 27 Evidence Act - Armed robbery - Firearm discovered as a result of information by third party - Whether admissible for the invocation of s. 27 - Court holding the fact of discovery of firearm against accused - Whether proper.

WORDS AND PHRASES: "every distinct offence" - Section 163 Criminal Procedure Code.

This was an appeal by the accused against conviction and sentence in respect of two charges of armed robbery under s. 4 of the Firearms (Increased Penalties) Act 1971 for which he was sentenced by the Sessions Court to imprisonment for the duration of his natural life and six strokes of whipping on each of the charges. Before the Sessions Judge, the accused was not represented by Counsel as he chose to appear in person.

The evidence showed that on 7 September 1991 at about 1.20 a.m, a robbery took place at house No 54, Kg. Chubadak Jaya, Sentul, Kuala Lumpur, in which two persons had been placed in fear of hurt and been robbed of their valuables by a gang of five persons including the accused. The robbery lasted for about 3 or 4 minutes during which one of the robbers was seen to exhibit and be armed with a revolver. At an identification parade held later by the police, one of the victims and an occupant of the premises where the robbery took place, identified the accused as the armed robber.

The facts further showed that following a police raid on the premises occupied jointly by the accused and one Ahmad Rosli, two incriminating watches were recovered from the said premises. A search list in respect of the recovery of these items was later issued to Ahmad Rosli by the police. Subsequently, on the information given by Ahmad Rosli, the police had also recovered the firearm in question, which was hidden in the ceiling of the bathroom of the said premises. The actual spot where the firearm was found hidden was pointed to the police by the said Ahmad Rosli.

The Sessions Judge, in calling for the defence and in subsequently convicting the accused, had drawn adverse inference against the accused on account of his failure to prove the involvement of Ahmad Rosli and had thus ruled that there were material circumstanstial evidence connecting the accused with the robbery. On appeal, the primary issues that arose were:

(1) Whether on the facts the prosecution was right in preferring two separate charges against the accused.
(2) Whether bearing in mind the nature and gravity of the charges, it was wrong for the trial Judge to proceed with the hearing of the case without the accused being assisted by Counsel, and in any case, whether there was any infringement of Article 8 of the Federal Constitution.
(3) Whether the identification evidence was unsatisfactory and it was therefore wrong for the trial Judge to accept those evidence without warning herself of the special need for caution before accepting the same.
(4) Whether on an application of the maximum evaluation test, the prosecution, at the end of its case, had proved beyond reasonable doubt, the charges against the accused.

Held:

[1] The prosecution was right in preferring two separate charges against the accused. Although there was some inter-relation between the two charges as the events against the two victims arose out of the same robbery, it is clear that the act of exhibiting the firearm generally and specifically against each of the victims in turn and then taking their valuables, was certainly a case of two distinct offences. In the circumstances, to prefer a single charge would be bad for duplicity and would lead to confusion as a distinct finding must be made regarding the act done by the assailant against each of the named victims, how each of them felt and the loss that each of them sustained.

[2] The right conferred by the second limb of Article 5(3) of the Federal Constitution, that a person shall be allowed to consult and be defended by a legal practitioner of his choice, does not mean that an accused person cannot be tried unless he is represented by Counsel. That provision does not prohibit the Court from hearing the case in the absence of Counsel, should the accused choose not to retain one. In the circumstances of this case Article 8 of the Constitution has not been infringed by reason of the absence of Counsel. Placed in a situation where the appellant chose not to retain Counsel, where on all hearing dates the Court was informed that the appellant was ready, willing and prepared to handle his own defence, the Sessions Judge could not be said to have erred in law in proceeding to hear the case the way she did.

[3] The Sesssions Judge had erred in fact in attributing possession of the watches on the appellant when the prosecution's case itself attributed posession of the incriminating watches to Ahmad Rosli. The trial Judge had also erred when she cast upon the

appellant the burden of proving Ahmad Rosli's involvement. The trial Judge had again erred in drawing an adverse inference against the appellant when the facts were equally consistent in the appellant's favour in that the watches could also, in the circumstances of the case, be attributable to Ahmad Rosli.

[4] The Sessions Judge erred in holding the fact of discovery of the firearm on premises jointly occupied by the appellant and Ahmad Rosli against the appellant. The information leading to the discovery of the firearm was given by Ahmad Rosli and not the appellant. In these circumstances this evidence is not admissible under s. 27 of the Evidence Act 1950. The recovery of a firearm *per se* on premises jointly occupied by Ahmad Rosli and the appellant was open to three interpretations and not only one. It would appear from the judgment that the Sessions Judge had failed to give due attention to any inference which could be drawn in the appellant's favour but only in respect of those against him.

[5] Bearing in mind that the maximum period of observation of the firearm by SP5 was short as the robbery was over within 3 or 4 minutes, and the manner in which the identification of the firearm was conducted, it cannot be said that the quality of identification evidence in respect of the firearm by SP5 is good. Like wise the quality of the identification evidence of SP2 and SP10 cannot be considered to be good. There was a need for the Sessions Judge to caution herself on the danger of relying on the correctness of this identification evidence which she failed to do. And there must also be other evidence to support the correctness of the identification.

[6] In this case the main basis of the Sessions Judge 's findings against the appellant was the drawing of inferences from the evidence in the trial, the basis of which are not legally sound. An appellate Court can certainly interfere with findings based on inferences which are against the weight of the evidence adduced. Bereft of the two pieces of circumstantial evidence which purportedly linked the appellant with the robbery, and in view of the quality of the identification evidence in this case, the prosecution case against the appellant is very feeble. Applying the maximum evaluation test pronounced in *Khoo Hii Chiang v. Public Prosecutor* the prosecution cannot be said to have proved the charges against the appellant beyond reasonable doubt at the end of the prosecution case and the Sessions Court should not have called for the defence.

[Appeal allowed. Conviction and sentence set aside].

Cases referred to:
Peter Tham Wing Fai v. Public Prosecutor [1988] 2 MLJ 424 ***(refd)***
Khoo Hi Chiang v. Public Prosecutor [1994] 2 CLJ 151/[1994] 1 AMR 6 ***(foll)***
R v. Turnbull & Ors. [1977] 1 QBD 224 ***(foll)***
Rangapula & Anor. v. Public Prosecutor [1982] 1 MLJ 93 ***(refd)***
Mahinder Singh v. Public Prosecutor [1967] 1 MLJ 126 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 153(i), 163, 257, 402A
Evidence Act 1950, s. 27
Federal Constitution, Articles 5(3), 8
Firearms (Increased Penalties) Act 1971, s. 4
Penal Code, s. 71

For the appellant - Haji Sulaiman b. Abdullah (Anita Socklingam with him); M/s. Zain & Co.
For the respondent - Zauyah bte Loth Khan, DPP

JUDGMENT

Zaleha Zahari JC:

Two charges under s. 4 of the Firearms (Increased Penalties) Act 1971 were preferred against the appellant, Rianto bin Sumiran, in the following terms:

First Charge:

Bahawa kamu, pada 7 September 1991 jam lebih kurang 1.20 pagi, di rumah No. 54, Kg. Chubadak Jaya, Sentul, Kuala Lumpur, di dalam Wilayah Persekutuan, telah melakukan satu kesalahan yang berjadual, iaitu rompakan bersenjatapi ke atas Othman bin Hashim KP: 5999644 (B), Wang Tunai RM4,700, (1) Utas Rantai Leher bernilai RM1,300, (1) Gelang Tangan Emas bernilai RM500, dan pada masa melakukan kesalahan yang berjadual itu, kamu telah mempamerkan sepucuk senjatapi, iaitu Revolver Smith & Wesson .38 Special siri Nombor J265398, dan dengan cara itu boleh mendatangkan perasaan takut untuk dicederakan ke atas Othman bin Hashim KP: 5999644 (B), dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s. 4 Akta Senjatapi (Penalti Lebih Berat) 1971 (Akta 37).

Second Charge:

Bahawa kamu, pada 7 September 1991 jam lebih kurang 1.20 pagi, di rumah No. 54, Kg. Chubadak Jaya, Sentul, Kuala Lumpur, di dalam Wilayah Persekutuan, telah melakukan satu kesalahan yang berjadual, iaitu rompakan bersenjatapi ke atas Pom Senuam, Pasport No: R020123, Wang Tunai RM200, (3) Utas Rantai Leher RM2,900, dan pada masa melakukan kesalahan yang berjadual itu, kamu telah mempamerkan sepucuk senjatapi, iaitu Revolver Smith & Wesson .38 Special siri Nombor: J265398 dan dengan cara itu boleh mendatangkan perasaan takut untuk dicederakan ke atas Pom Senuam Pasport No: R020123, dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s. 4 Akta Senjatapi (Penalti Lebih Berat) 1971 (Akta 37).

The appellant was found guilty and convicted of both charges by the learned Sessions Court Judge on 5 August 1992 and sentenced to imprisonment for the duration of his natural life and with whipping of 6 strokes in respect of each charge. This is an appeal against the conviction and sentence.

It has been by no means an easy case to decide in an appellate capacity owing to the fact that the findings of guilt on both charges recorded by the Sessions Court Judge have been attacked on several grounds with a view to their reversal. This has accordingly necessitated a most anxious and critical analysis of the evidence and submissions on both sides with care and in some detail before being able to reach the conclusion which I have now arrived.

The Charges

Firstly, the attack on the charges.

Briefly the prosecution's case is, that on 7 September 1991 at about 1.20 a.m. at house No. 54 Kg. Chubadak Jaya, Sentul, Kuala Lumpur, two persons, i.e. Othman b. Hashim and Pom Sennuam, had been placed in fear of hurt and been robbed of their valuables by a gang of 5 persons. It was the prosecution's case that the appellant was one of the robbers and during the robbery it was alleged that he was armed with a Smith and Wesson .38 Special revolver bearing serial number J265398.

Counsel for the appellant submits only one charge should have been preferred. He contends that there was only one transaction, that there was only one robbery in respect of which 2 persons had been robbed.

The learned Deputy Public Prosecutor took issue. She submitted that s. 153(i) Criminal Procedure Code provides that the charge shall contain particulars as to the time and place of the alleged offence and the person against whom in respect of which it was committed as are reasonably sufficient to give notice of the matter with which he is charged. Further, s. 163 Criminal Procedure Code provides that for every distinct offence there shall be a separate charge. She submitted that the facts here disclose that 2 individuals had been placed in fear of hurt when the gun was pointed out against each one of them in turn. Each one of them had their respective valuables stolen. Illustration 2 s. 71 Penal Code was cited as authority in support.

The question here for determination is what is meant by "every distinct offence". "Distinct" in its ordinary meaning means "not identical". In *Peter Tham Wing Fai v. PP* [1988] 2 MLJ 424 & 432 Chua J. ruled two offences would be distinct if they are not in any way inter-related but if there is some inter-relation it would depend on the circumstances of the case in which the offences were committed whether there is only one transaction and only one offence was committed.

In the present case I hold that that the prosecution was right in preferring 2 separate charges. Although I accept that there was some inter-relation between the two charges as the events against the two victims arise out of the same robbery, it is clear that the act of exhibiting the firearm generally and specifically against each of the named victims in turn and then taking their valuables was certainly a case of two distinct offences. To prefer a single charge would in my view be bad for duplicity and lead to confusion as a distinct finding must be made regarding the act done by the assailant against each one of the named victims, how each one of them felt and the loss that each one of them sustained.

Right to Counsel and Article 8 of Federal Constitution

The second point for consideration is what is the ambit of the right to Counsel and whether Article 8 Federal Constitution had been infringed as the appellant in this case was not represented by the Counsel during trial.

Counsel contends that it was wrong for the Sessions Court Judge to proceed with the hearing of this case without Counsel. He argues that this case involved arguments on points of law in respect of a defence of alibi under s. 402A Criminal Procedure Code, that the charges preferred were serious and also involved issues relating to admissibility of certain evidence. Further although on record the learned Sessions Court Judge explained the requirements of s. 402A Criminal Procedure Code it would appear that the appellant did not understand the explanation as the defence presented continued to be that of an alibi. He further contended that although on record it would also appear that the Sessions Court Judge had complied with s. 257 of the Criminal Procedure Code he was of the view the explanation given was insufficient as a material point implicating the appellant with regard to the recovery of firearm at a house jointly occupied by the appellant with another person was not highlighted in the said explanation.

In considering the ambit of the right to Counsel to this case, note is taken of the following facts.

I note that, on 11 May 1992, the appellant informed the Court that he did not require the service of Counsel and was ready to proceed. On the adjourned hearing date, 13 May 1992, the record again shows that the appellant was ready to proceed. The record also

shows, upon the Court being notified of the appellant's intention to call an alibi and following the explanation of the Court of the provisions of s. 402A Criminal Procedure Code and the conditions imposed therein that must be observed before defence of an alibi can be admitted, it would appear that the appellant changed his stand, that he wanted the case to proceed, and that he would not be raising the issue of an alibi. The Court then proceeded to hear the case.

I am of the view that the right conferred by the second limb of Article 5(3) of the Federal Constitution, that a person shall be allowed to consult and be defended by a legal practitioner of his choice, does not mean that an accused person cannot be tried unless he is represented by Counsel. That provision does not prohibit the Court from hearing the case in absence of Counsel, should the accused choose not to retain one. In the circumstances of this case I hold that Article 8 of the Federal Constitution has not been infringed by reason of the absence of Counsel. Placed in a situation where the appellant chose not to retain Counsel, where on all hearing dates the Court was informed that the appellant was ready, willing and prepared to handle his own defence, I hold that the learned Sessions Court Judge had not erred in law in proceeding to hear the case.

With regard to the legal points and complexities which developed during the course of trial, that relating to the admissibility of certain evidence, and whether the Sessions Court Judge had fully discharged her responsibility in respect of the procedural requirements set out by the law, I am of the view these are all matters arising subsequent to the making of her decision to proceed to trial and are matters to be determined on the merits of the appeal. I will deal with each one of them in turn.

Whether the prosecution had made out a *prima facie* case?

Appellant contends that the learned Sessions Court Judge erred in holding that the prosecution had made out a *prima facie* case on an application of the maximum evaluation test as set by the pronouncement of the Supreme Court in *Khoo Hi Chiang v. Public Prosecutor* [1994] 1 AMR 6. I will now consider whether this allegation is of merit.

To prove that the appellant was one of the men involved in the robbery, and the person who held the firearm on the night in question, it would appear that the prosecution relied on the following facts:

(i) Recovery of 2 watches (Exhibit P4 & P5) by SP3 on 9 September 1991 in a room jointly occupied by appellant together with one Ahmad Rosli;

(ii) Recovery of a firearm Smith and Wesson .38 Special Serial No. NOD 36-IG14G1810 (Exhibit P1) by SP6 on 10 September 1991 in the ceiling of a bathroom of the flat jointly occupied by the appellant together with Ahmad Rosli;

(iii) Identification of the appellant as the man holding the firearm by SP2 on 18 September 1991 at an identification parade;

(iv) Identification by SP5 on 18 September 1991 that the firearm recovered by SP6 on 10 September 1991 from the ceiling of the bathroom of the flat jointly occupied by the appellant and Ahmad Rosli was the firearm held by one of the robbers on the night of the robbery in question;

(v) Identification by SP5 on 26 September 1991 that, of the two watches recovered from the room jointly occupied by the appellant and Ahmad Rosli (Exhibit P4 & Exhibit P5), P5 belonged to her whilst P4 belonged to Emrah bin Ahmad who was then also living on the premises robbed;

(vi) Identification of the appellant by SP2 in Court;
(vii) Identification of the appellant by SP10 in Court.

It is therefore incumbent upon me to examine the circumstantial and direct evidence adduced by the prosecution in support of the above and to ascertain and evaluate the decision of the learned Sessions Court Judge in respect of them.

Recovery of Watches

From the judgment of the learned Sessions Court Judge the material circumstantial evidence connecting the appellant with the robbery, *inter alia*, is the recovery of the two watches, (Exhibit P4 & P5), on premises jointly occupied by the appellant together with Ahmad Rosli during the police raid on 9 September 1991. According to her judgement:

> Satu lagi faktor yang berat yang menunjukkan penglibatan Tertuduh di dalam rompakan ialah dengan terjumpanya dua bentuk jam di bilik tumpangan tertuduh semasa pihak polis membuat serbuan. Kedua bentuk jam ini telah disahkan hilang daripada rumah SP1 dan SP5 selepas kejadian rompakan itu. Tertuduh di dalam pembelaannya tidak ad a menyentuh, tentag dua bentuk jam ini. Oleh sebab tiada langsung keterangan menunjukkan penglibatan rakan sebilik tertuduh, iaitu Ahmad Rosli di dalam rompakan itu, maka kehadiran kedua-dua bentuk jam ini di bilik itu merupakan keterangan keadaan (circumstantial evidence) yang menunjukkan penglibatan Tertuduh di dalam rompakan yang berlaku di rumah SP1 dan SP5.

The question here for determination is whether the learned Sessions Court Judge was right in making the conclusions and inferences that she did.

On this issue appellant's Counsel drew the Court's attention to the fact that the first information report (Exhibit P2) makes no mention of the loss of any watch. Further an examination of the search list (Exhibit P10) issued in respect of the two incriminating watches recovered would reveal that it was not issued to the appellant but to Ahmad Rosli. He therefore contends that from the prosecution's own evidence it would appear Ahmad Rosli was in possession of the two incriminating watches and not the appellant. He therefore submitted that the Sessions Court Judge erred in these circumstances by making a wrong inference and drawing an incorrect conclusion against the appellant when the facts were equally capable of an inference and a construction in the appellant's favour, i.e. that the watches belonged to Ahmad Rosli and not the appellant.

I note that the Deputy Public Prosecutor has chosen not to respond to Counsel's submission on these points.

After evaluating the evidence on this issue I hold that the learned Sessions Court Judge erred in fact in attributing possession of the Exhibits P4 and P5, in relation to the 2 watches, on the appellant when the prosecution's case itself attributed possession of the incriminating watches Exhibit P4 and P5 to Ahmad Rosli and only a non incriminating watch brand 'Tonica' to the appellant.

I also hold that the learned Sessions Court Judge erred in casting upon the appellant the burden of proving Ahmad Rosli's involvement. I am in agreement with the appellant's Counsel that in these circumstances the learned Sessions Court Judge erred in drawing an adverse inference against the appellant when the facts were equally consistent in the appellant's favour in that the watches P4 and P5 could also, in the circumstances of this case, be attributable to Ahmad Rosli.

Recovery of Firearm

From the judgment of the Sessions Court Judge the discovery of a firearm arising from the questioning of the appellant and Ahmad Rosli was a factor taken into consideration in determining the guilt of the appellant. Her judgment reads:

> Selain daripada itu pihak pendakwaan telah menunjukkan bahawa senjatapi (P1) yang digunakan oleh tertuduh semasa rompakan itu telah diperolehi oleh Inspektor Che Noh b. Ismail hasil daripada soalsiasat yang dilaksanakan ke atas tertuduh dan rakan Ahmad Rosli.

The evidence led by the prosecution on this issue is as follows.

On 10 September 1991 at about 4.30 p.m., Chief Inspector Che Noh b. Ismail (SP6) questioned the two men who were then in custody, Ahmad Rosli and the appellant. He testified that:

> Saya menyoal tertuduh sama ada dia ada menyimpan apa-apa senjatapi. Semasa saya menyoal kedua lelaki ini, mereka telah ditangkap oleh Inspektor Roslan.
>
> Saya menyoal satu soalan kepada tertuduh dan dua soalan kepada Ahmad Rosli. Soal pertama terhadap A. Rosli - (1) adakah awak ada simpan pistol dimana? Soalan kedua "boleh awak bawa saya dan tunjukkan dimana tempat awak simpan pistol itu?" Ahmad Rosli memberi jawapan terhadap kedua-dua soalan.
>
> Soalan kepada tertuduh ialah adakah awak ada simpan apa-apa pistol dimana-mana. Saya ada menerima jawapan daripada tertuduh.

In answer to questions posed in cross-examination SP6 testified that the appellant and Ahmad Rosli were handcuffed together during the questioning. SP6 denied the defence allegation that the appellant was being questioned alone, that the appellant replied that he did not know and that Ahmad Rosli was only brought in subsequently. Under cross-examination SP6 further testified:

> Setelah saya menyoal Ahmad Rosli, Ahmad Rosli kata dia tolong menyimpan pistol itu atas permintaan tertuduh sendiri untuk disorok.
>
> Memang saya diberitahu oleh tertuduh yang dia tidak tahu dimana Ahmad Rosli menyimpannya.

At about 5.25 p.m., about an hour after he commenced questioning Ahmad Rosli and the appellant, SP6, further testified:

> Ahmad Rosli dan tertuduh membawa saya ke sebuah rumah flat bernombor 350C Tingkat 3 Jalan Pahang, Kuala Lumpur. Bila tiba di tempat itu, A. Rosli membawa saya ke sebuah bilik mandi di rumah di flat itu dan tunjukkan kepada saya satu lubang pada siling di bahagian atas bilik mandi dan beritahu saya yang pistol ada disimpandi bahagian atas siling. Saya panjat dan seluk lubang siling dengan tangan dan menjumpai dua bungkusan akhbar Harian Metro bertarikh 30 Ogos 1991. Bila dibuka salah satu bungkusan mengandungi satu pucuk revolver jenis Smith & Wesson .38 Special bersiri nombor NOD36-IG14G1810. Di satu bungkusan lagi mengandungi 6 butir peluru .38. Saya buka kedua-dua bungkusan ini di tempat itu juga di depan tertuduh dan Ahmad Rosli. Pada masa saya mendapatkan kedua-dua bungkusan ini tertuduh dan A. Rosli berada bersama-sama saya.

From the evidence adduced Counsel for the appellant contends that what the prosecution is attempting to do is to establish a fact of discovery of a firearm and that the firearm was discovered as a result of something which appellant and Ahmad Rosli said. He was of the view that such evidence was only admissible through s. 27 Evidence Act 1950 and that the facts in this case do not support its admission through the said section.

He submitted, from the evidence adduced, it was unclear what was the information obtained by the police from Ahmad Rosli and the appellant. From SP6's evidence it would appear that it was Ahmad Rosli who gave information to the police relating to the recovery of the firearm. The statement made by Ahmad Rosli to SP6 that the appellant asked Ahmad Rosli to hide the firearm was hearsay as Ahmad Rosli was not called to testify. Further, Ahmad Rosli was the principal tenant of the premises upon which the gun and ammunition was found. In these circumstances he contends that the appellant did not have exclusive control of the premises nor of the firearm recovered.

He submitted the evidence of SP6 was also very clear as to who gave the information relating to the recovery of firearm. It was Ahmad Rosli who informed SP6 that there was a pistol in the said ceiling. It was Ahmad Rosli who brought SP6 to the bathroom. It was also Ahmad Rosli who showed SP6 the hole in the ceiling where the firearm was. In these circumstances it was his submission that the learned Sessions Court Judge erred in law in admitting the said evidence when the conditions under s. 27 Evidence Act was not satisfied. Consequently it was his further submission she also erred in holding the fact of discovery of the firearm against the appellant.

The response to this submission was short. The Deputy Public Prosecutor submitted that s. 27 Evidence Act 1950 was not relevant, that there was nothing in the notes of proceedings to show that the prosecution was admitting any statement pursuant to s. 27 Evidence Act. The question of who was questioned first and what were the replies to such questions were irrelevant. According to her the material point for the Court to consider is that a firearm had in fact been recovered arising from investigation against both the appellant and Ahmad Rosli and from premises occupied by the appellant and Ahmad Rosli. That was all. This was a case of exhibiting a firearm during a robbery. According to her this was not a case where possession is a material fact where the prosecution had to prove custody and control.

I am of the view that on an evaluation of the evidence adduced on this issue of the discovery of a firearm and ammunition as a result of information given, and the police being led to the spot where they were hidden, was clearly an attempt on the part of the prosecution to invoke s. 27 Evidence Act 1950. I hold that the learned Sessions Court Judge erred in holding the fact of discovery of the firearm on premises jointly occupied by the appellant and Ahmad Rosli against the appellant. From the evidence led by the prosecution there was no evidence of the information alleged to have been obtained from the appellant. On the contrary, from the testimony adduced from SP6, the information leading to the discovery of the firearm was given by Ahmad Rosli and not the appellant. In these circumstances this evidence is therefore not admissible under s. 27 Evidence Act 1950.

Even if I am to view this issue not from the view point of admissibility pursuant to s. 27 Evidence Act 1950 but as contended by the learned Deputy, I am of the view that the recovery of a firearm *per se* on premises jointly occupied by Ahmad Rosli and the appellant was open to 3 interpretation and not to only one, i.e.:

(a) that both Ahmad Rosli and the appellant knew of the presence of the firearm;
(b) that only Ahmad Rosli knew of the presence of the firearm;
(c) that only the appellant knew of the presence of the firearm.

It would appear from the judgment that the learned Sessions Court Judge failed to give due attention to any inference which could be drawn in the appellant's favour but only in respect of those against him.

I therefore hold that the learned Sessions Court Judge erred in fact when she attributed the recovery of the firearm arose out of information given by the appellant. Subsequently, I also hold that she erred in law in holding the fact of recovery of the firearm recovered in respect of information given by Ahmad Rosli against the appellant. In all of the circumstances of this case I also hold that she erred in casting the burden on the appellant to show Ahmad Rosli's involvement as well as in drawing an adverse inference against the appellant thereby coming to an incorrect conclusion by attributing knowledge of the presence of the firearm wholly against the appellant.

Identification of Firearm by SP5

It may at this stage be opportune for me to consider the attack levelled against the testimony of SP5 relating to her identification of the firearm recovered on 10 September 1991 as the firearm held by one of the robbers whom, she was however unable to identify.

It would appear from the grounds of judgement that the Sessions Court Judge accepted as a fact that the firearm recovered from premises occupied by the appellant and Ahmad Rosli was the one held by one of the robbers during the robbery based on the identification evidence of SP5.

According to appellant's Counsel the quality of SP5's identification evidence in relation to the firearm was poor and unreliable as:

(a) the maximum period of observation was very short as the robbery was over in 3-4 minutes;
(b) SP5 could not have been in a position to see the firearm clearly by reason of the fact that the person holding the firearm used both his hands to hold it;
(c) the firearm's identification was not properly held as the items displayed were not of similar size, shape and features, that effectively, the witnesses were given only a choice between one of two; and
(d) the existence of an inconsistency in SP5's testimony that there were only 8 firearms on display at the identification of firearm between that shown in photograph P6 which showed that 10 firearms were on display.

Essentially this involves an assessment of the credibility of witness on the part of the Session's Court Judge to make. However I am in agreement with Counsel for the appellant that in the light of all of the surrounding circumstances of this case as enumerated by him and the manner in which the identification of firearm was conducted, it cannot be said that the quality of identification evidence in respect of the firearm by SP5 is good. There was a need for the Sessions Court Judge to caution herself on the danger of relying on the correctness of this identification evidence which she failed to do.

Defence of Mistaken Identity

The main thrust of the defence in the Court below is that of mistaken identity. In the appeal before me Counsel attacked the identification evidence of SP2 and SP10 that the appellant was the man holding the firearm during the robbery on the night in question as being also of poor quality and that no weight should be attached to it.

From the record, the evidence of SP2 and SP10 given on this issue are as follows:

(a) Evidence of SP2

Mohd. Isa bin Ahmad was then also staying in the premises where the robbery took place. He was very positive in his testimony that he was in a position to identify the person holding the gun.

The appellant was a stranger to him. He described the clothes worn, the built of the man, that he was young, about 5 ft. 4 ins. tall.

In respect of the identification parade held 11 days after the incident, on 18 September 1991, he identified the appellant as the man who came to the house and held a gun on the night in question. He identified the appellant through the appellant's eyes which according to him was "terjangkil garang" and through "rupa, paras dan gaya".

(b) Evidence of SP10

With regard to the identification evidence given by SP10, this witness testified that the room was brightly lit, that he could observe the man clearly, that he was standing at a distance of only 6-7 feet away when the gun was pointed to him and directed to lie down. He then made a dock identification and identified that appellant as the man holding the gun during the robbery in question.

It would appear the learned Sessions Court Judge accepted SP2 and SP10's evidence of identification when in her judgement she ruled:

> Walaupun SP2 dan SP10 turut sama diarahkan supaya meniarap dan jangan bergerak, mereka perolehi peluang untuk melihat wajah lelaki yang memegang senjatapi itu. Kedua-dua saksi ini telah mengecam yang lelaki yang bersenjatapi itu adalah tertuduh. SP2 dan SP10 dapat mengecam tertuduh kerana semasa kumpulan lelaki memasuki rumah dan melakukan rompakan, keadaan di dalam rumah adalah terang kerana lampu terpasang, semua yang berada di rumah itu berkumpul di satu tempat di rumah itu dan tertuduh ada datang hampir kepada mereka.

On this point Counsel drew the Court's attention on to the guidelines set out in the Court of Appeal decision in *R v. Turnbull & Ors.* [1977] 1 QBD 224 at 228:

> First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the Judge need not use any particular form of words.
>
> Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation. At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or an indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

In the circumstances of this case, he submitted, there was a requirement for the learned Sessions Court Judge to warn herself of the special need for caution before convicting in reliance on the correctness of the identification made by SP2 and SP10.

In *Rangapula & Anor. v. Public Prosecutor* [1982] 1 MLJ at 93, the learned Judge relied on the Federal Court decision of *Mahinder Singh v. Public Prosecutor* [1967] 1 MLJ 126 where it was held:

> It was not sufficient merely that the appellant appeared quite certain in his own mind that the accused was his assailant. It was clearly necessary for the Court to examine also the grounds of his belief before regarding the question as closed.

Counsel submits in all of the circumstances of this case the learned Sessions Court Judge erred in not entertaining any doubt on this matter. Identification is based on a very short period of observation. All eye witnesses testified that the robbery happened very fast, that it was all over in 3-4 minutes. All of the persons present, including SP2 and SP10 were made to lie down. The quality of the identification is therefore poor.

To this argument the learned Deputy Public Prosecutor argued forcefully and sought the Court to accept SP2 and SP10's evidence on identification of the appellant. Although the period of observation was only 3-4 minutes, as the room was brightly lit, they were in a position to see and identify the appellant.

In my judgment, applying the guidelines set in *R v. Turnbull & Ors.* [1977] 1 QBD 224, taking into consideration the period of their observation of 3-4 minutes during the hurly burly of a robbery where all present, including SP2 and SP10 were made to lie down, the quality of SP2 and SP10's identification evidence cannot be considered to be good. The learned Sessions Court Judge should have cautioned herself that it was safe to rely on such evidence. From the record, it would appear that she did not do so. There must be other evidence to support the correctness of the identification.

The Deputy Public Prosecutor has urged this Court not to interfere, not to substitute its own findings of fact, for that of the trial Judge. In this case however, the main basis of the learned Sessions Court Judge's findings against the appellant was the drawing of inferences from the evidence in the trial, the basis of which, for the reasons I have enumerated above, are not legally sound. An appellate Court can certainly interfere with findings based on inferences which are against the weight of the evidence adduced. Bereft of the two pieces of circumstantial evidence which purportedly linked the appellant with the robbery, and in view of the quality of the identification evidence in this case, the prosecution case against the appellant is very feeble. I hold that applying the maximum evaluation test in *Khoo Hi Chiang v. Public Prosecutor* [1994] 1 AMR 359 the prosecution has not proved the charges against the appellant beyond all reasonable doubt at the end of the prosecution case and the learned Sessions Court should not have called for defence.

In the light of the above findings I have considered it unnecessary to deal with the other grounds of appeal.

For the reasons given I allow the appeal and set aside the conviction and sentence.